BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

V. J. MAGEE, Claimant, v. THOMPSON CREEK MINING COMPANY, Employer, and ACE FIRE UNDERWRITERS INSURANCE COMPANY, Surety, Defendants.	)	**IC 2000-020426** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed October 21, 2008

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Twin Falls, Idaho, on May 8, 2007. Claimant was present and represented by Emil Pike, Jr., of Twin Falls. Glenna M. Christensen of Boise represented Employer/Surety. Oral and documentary evidence was presented. The parties took four post-hearing depositions and submitted post-hearing briefs. This matter came under advisement on July 15, 2008, and is now ready for decision.

PROCEDURAL HISTORY

A previous hearing was held by the Industrial Commission on March 17, 2004, for which the same parties, attorneys and referee were present. The Commission issued a decision on October 15, 2004, with the following Conclusions of Law:

1. Claimant suffered an injury caused by an accident arising out of and in the course of his employment on May 6, 2000.

2. Claimant is entitled to permanent partial impairment (PPI) benefits equaling 10% of the whole person with no apportionment for pre-existing conditions.

3. Claimant is not entitled to continuing medical care.

4. Claimant is entitled to permanent partial disability (PPD) benefits equaling 20% of the whole person inclusive of his PPI.

5. Apportionment of PPD benefits pursuant to Idaho Code § 72-406 is not appropriate.

6. Claimant is entitled to be reimbursed for any payments made to Dr. Kurtz and Defendants are liable for any unpaid balance.

7. Claimant is entitled to be reimbursed for mileage to obtain medical treatment.

8. Claimant is entitled to be reimbursed for any payments made for prescriptions prescribed by Dr. Kurtz and Defendants are liable for any unpaid balance with the exception of one prescription for Amaryl.

Claimant filed a Motion for Reconsideration on November 3, 2004, which was denied by the Commission on December 2, 2004. Claimant filed an appeal with the Idaho Supreme Court on January 12, 2005, with regard to adverse findings regarding permanent disability and future medical benefits.

In Magee v. Thompson Creek Mining Co., 142 Idaho 761, 133 P.3d 1226 (2006), the Court affirmed the decision of the Commission. Claimant's Motion for Rehearing was denied on May 9, 2006. The Court clarified that the Commission's determination of non-entitlement to future medical care referred to further Colchicine injections or Prolo therapy but not to other medical care or need for prescription medication. All other findings were expressly affirmed, as drafted by the Commission.

While his appeal was pending before the Idaho Supreme Court, Claimant filed a separate Complaint with the Commission on March 29, 2005, in which he asserted that the Commission's

initial award should be modified as permitted by Idaho Code § 72-719, due to a change in Claimant's condition and/or because the initial award resulted in manifest injustice. The hearing of May 8, 2007 was held to address this issue and to determine if the previously decided issues should be re-visited.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant has sustained a change in condition pursuant to Idaho Code § 72-719;

2. Whether the case is properly reviewed pursuant to Idaho Code § 72-719 to correct a manifest injustice;

3. Whether Claimant's claim pursuant to Idaho Code § 72-719 is barred by the five-year statute of limitations contained therein;[1]

4. Whether the issues raised by Claimant are *res judicata*;

5. Whether Claimant is entitled to reasonable and necessary additional medical care as provided for by Idaho Code § 72-432, and the extent thereof;

6. Whether Claimant is entitled to additional permanent partial impairment (PPI), and the extent thereof;

7. Whether Claimant is entitled to additional permanent partial disability (PPD) in excess of permanent impairment, and the extent thereof;

8. Whether Claimant is entitled to additional permanent disability pursuant to the odd-lot doctrine or otherwise; and

[1] Defendants withdrew this issue in its post-hearing brief based on evidence that Claimant's Complaint regarding Idaho Code § 72-719 issues was timely filed. The limitations issue will not be further addressed in this decision.

9. Whether Claimant is entitled to attorney fees due to Employer/Surety's unreasonable denial of compensation as provided for by Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant contends that the 10% PPI rating and 20% PPD rating previously assigned are inequitable and that he should be found 100% disabled, or in the alternative, that he should be deemed totally and permanently disabled pursuant to the odd-lot doctrine. Claimant maintains that the Commission may properly modify its previous order pursuant to Idaho Code § 72-719 because his condition has changed as the result of depression and implantation of a nerve stimulator. Further, Claimant asserts that failure to modify the previous award will result in manifest injustice.

Defendants contend that Claimant has failed to meet his burden of proof to establish a change in condition or manifest injustice that would warrant modification of the Commission's previous decision, which has been affirmed by the Idaho Supreme Court and become final. Alternatively, Defendants maintain that Claimant's condition has slightly improved rather than worsened and that an increase in impairment and/or disability benefits is not warranted. Defendants argue that the doctrine of *res judicata* is applicable and that new evidence presented by Claimant at the 2007 hearing should have and could have been presented at the previous hearing.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. All evidence considered in the Industrial Commission's decision of October 15, 2004;

2. The Industrial Commission's legal file;

3. Claimant's Exhibits 1 through 3 admitted at the May 8, 2007 hearing; and

4. The post-hearing depositions of Curt G. Kurtz, M.D., and Jim Deming, Ed.D., taken by Claimant on July 11, 2007; the post-hearing deposition of Roy Tyler Frizzell, M.D., taken by Defendants on July 26, 2007; and the post-hearing deposition of Douglas Crum, CDMS, with one exhibit taken by Claimant on February 12, 2008.

Defendants' objections made during the taking of Dr. Kurtz' deposition are overruled.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

Relevant Findings from October 15, 2004, Hearing

1. Claimant was 53 years of age at the time of the [October 15, 2004] hearing and resided in Radersburg, a small mining town in Montana. He has an 8th grade education and no GED. He has worked primarily as an underground miner and millwright, but has also worked in the oil fields and has driven trucks. He has generally worked as a heavy laborer.

2. Claimant injured his back, SI joint, and left ulnar nerve in 1983; it took him about three years to recover. Since that time he was able to return to heavy work.

3. Claimant alleges that on May 6, 2000, he either mis-stepped or slipped while going up some stairs at Employer's mine near Challis and fell on his leg on the landing. He thought he pulled a muscle in his right hip. He finished his shift as he "didn't think nothing about it."

4. Claimant's shift ended at 7:00 a.m. and he went to his temporary home in Clayton and went to bed. By 10:00 a.m. he was experiencing pain down his right leg. He had a neighbor summon an ambulance that was kept at Employer's mine and he was transported to the hospital at Sun Valley. He gave a history consistent with his hearing testimony regarding his near slip and fall. He was complaining of severe low back pain with radiation into his right leg, but not

beyond his knee. The treating physician diagnosed acute low back pain with sciatica. An X-ray did not reveal any acute pathology of the lumbar spine. An MRI was ordered to rule out an acute herniation or free fragment versus a simple strain. Of note, Claimant was kept overnight as he was unable to be treated adequately for pain with IM Demerol 100, 4 mg total of morphine, and 2 oral Vicodin.

5. Claimant's wife (Cathy) [now ex-wife] drove from Montana to pick Claimant up the following day. His wife testified that he was in "agony" of a type she had not seen before when she picked him up. Claimant testified, "[m]y wife took me home and dumped me on the floor at the house and said, 'I've got to go to work,' and that – I stayed there for a month on the floor in the house." Cathy corroborated Claimant's testimony in that regard but testified she thought he lay on the floor from two weeks to a month before he first sought medical treatment.

6. Claimant eventually contacted his family physician, Curt G. Kurtz, M.D., who had him come to his (Dr. Kurtz) house for treatment. Dr. Kurtz testified that Claimant stayed at his home for several days until he was stable enough to return to his own home. Dr. Kurtz had no memory of making a note of that visit but his records admitted into evidence show that he saw Claimant for the first time regarding the subject accident on May 11, 2000. Consequently, both Claimant and his wife are in error regarding the amount of time Claimant spent lying on the floor (five days versus two weeks to a month).

7. Claimant embarked upon a lengthy course of treatment with Dr. Kurtz, a board-certified family practitioner who has practiced in Montana since 1968. That treatment spanned slightly over three years and involved approximately 88 weekly or biweekly visits according to his medical records that consume 103 pages of the record. Dr. Kurtz treated Claimant primarily for an acute low back strain, a stretched sciatic nerve, and an SI joint "disruption." His treatment regimen included Colchicine IV, trigger point injections, and Prolo therapy. Dr. Kurtz described Colchicine as a "real old anti-inflammatory" that reduces swelling in nerves and other tissue. It is FDA-approved for the treatment of acute gout only. Dr. Kurtz described Prolo therapy as:

> Prolo therapy is an old treatment from Germany that dates back about 150 years where they felt that if you injected an irritant into a tendon or a joint or a ligament or a muscle that the irritation would cause the memory of the cells that created the muscle to come forward, the memory would open up, you take a look around, clean out the junk and actually build a new ligament, tendon, muscle, joint lining, et. cetera.

Dr. Kurtz' deposition of April 13, 2004, pp. 13-14.

8. Dr. Kurtz assigned Claimant a whole person PPI rating of 28% according to DRE category V of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (*Guides)*. He assigned an additional 10% whole person PPI according to Table 15-19 for a fracture of the sacrum into the SI joint for a total of 38%.[2] At Defendants' request, Henry H. Gary, M.D., a board-certified neurosurgeon, and Michael A. Sousa, M.D., a board-certified orthopedic surgeon and IME examiner, both practicing in Montana (the panel), saw Claimant on May 1, 2001, and again on March 3, 2004. Utilizing the Fourth Edition of the *Guides*, page 3/102, DRE Lumbosacral, Category 3, the panel assigned Claimant a 10% whole person PPI. Dr. Sousa commented in his deposition on the methodology used by Dr. Kurtz in arriving at his PPI rating:

> Q. (By Ms. Christensen): No. He [Dr. Kurtz] was looking at the Fourth Edition – excuse me—the Fifth Edition, page 387. He looked under DRE, Category 4 is where he placed him?
>
> A. Well, first of all, there's two things: One is there is no evidence that Mr. Magee had a sacroiliac fracture, at least from the record that we evaluated. There was no X-ray evidence or CT evidence that he had sustained a fracture of the sacroiliac.
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> Secondly, the DRE Category 4 impairment is for a loss of integrity of a segmental region in the spine secondary to either fusion or injury in which there's a translation of the vertebrae, one upon the other, and neither of which he had had.
>
> So I – and actually the Category 5, 28 percent, I'm sorry, would be – and I'll read: The impairment would be one [that] meets criteria for Categories 3 and 4; that is, both radiculopathy, i.e. nerve injury, if you will, from a disc herniation, and alterations of motion segment integrity in which they're either fused if there's significant slippage of one vertebrae on another. And, also, there has to be

[2] The Referee takes notice that according to the combined values chart in the *Guides*, 5th Edition, 28% plus 10% equals 35%, not 38%.

> significant lower extremity impairment, as seen with – indicated by atrophy or loss of reflexes and sensory changes in anatomic distribution.
>
> So the clincher is that, one, it's a different impairment book. Secondly, the patient does not have evidence – and the evidence that we were presented with – of altered motion segment integrity. And so he would not fit in Category 5, unless he did have or consented to have a fusion, and reexploration of the L5-S1 disc spaces had been recommended.

Dr. Sousa's deposition of April 14, 2004, pp. 18-19.

9. The panel opined that their 10% whole person PPI rating would also apply to any PPI that would have been assigned for Claimant's 1983 injury and discectomy. However, because the panel had no medical records regarding the 1983 injury and were not aware of any PPI rating being assigned for that injury, they assigned their rating based on the 2000 injury.

10. The Referee is more persuaded by the opinions of the panel than those of Dr. Kurtz regarding PPI. It has been this Referee's experience that a rating in the neighborhood of 10% is common for the type of injuries sustained by Claimant. Because Claimant recovered from his 1983 back injury and returned to heavy labor for a number of years with no apparent difficulty, the Referee finds that apportionment is not warranted in this case. The Referee finds that Claimant has incurred a 10% whole person PPI solely as the result of his May 6, 2000, injury.

11. Dr. Kurtz testified that he recommends Claimant continue with the Colchicine injections to keep his injured L5-S1 nerve root unswollen to allow Claimant to be more active. He testified that the Prolo therapy stabilized Claimant's SI joint but he would continue those injections if Claimant continued to experience pain in that area.

12. In their report of May 1, 2001, the panel recommended two treatment options. One would be to continue with Dr. Kurtz conservative care including a stretching program and nonsteroidal anti-inflammatories. The other would be a lumbosacral fusion. In the panel's report of March 3, 2004, they indicate that Claimant told them he does not wish for surgery or any more injections, but may change his mind if his condition deteriorates. They also note that Claimant informed them that Dr. Kurtz' Colchicine injections had been beneficial. Because

Claimant did not want surgery or other invasive treatment, the panel did not recommend further diagnostic testing. However, should Claimant's symptoms worsen, they recommend a repeat MRI scan with contrast. They do recommend continuing conservative care. In his April 14, 2004, deposition, Dr. Gary testified that Claimant should not continue with the Colchicine IV treatment. The Referee finds that Claimant has failed to prove his need for further medical treatment as the result of his May 6, 2000, injury. Dr. Kurtz testified that it should take three to four years for Claimant to heal. As for Dr. Kurtz deposition on April 13, 2004, it had been close to four years since Claimant's injury. In the event Claimant's condition worsens and he changes his mind regarding surgery or other invasive treatment options, he has available to him Idaho Code § 72-432(1) or may petition for a change of condition pursuant to Idaho Code § 72-719(1)(a).

13. As previously indicated, Claimant's work history has been that of doing heavy work. The panel has opined Claimant now fits within the sedentary-to-light work categories with ad lib position changes and no prolonged sitting, standing, stooping, or bending.

14. Dr. Kurtz does not believe Claimant can work at all because:

> Q. (By Mr. Pike): Now, Doctor, in a report dated November 27th, 2001, you stated that Mr. Magee could possibly return to work in his field. Restrictions would be on the weight he could lift and that he could carry, and so in [*sic*] November 27th, 2001, you indicated he could possibly return to work with some restrictions on the weight.
>
> Today are you changing that opinion or do you still have that opinion today?
>
> A. No. In November of 2001 I was trying to work with the – the company that he worked for to get him back to work. And we tried to get – with the restrictions placed, but he got down there and there was nothing that he could do with those restrictions at all.
>
> And at this point in time, after watching him and getting everything back and stable and everything else and seeing that he still has chronic pain, he still is being adversely affected by the weather, he's still being adversely affected by electrical storms, and it's so unpredictable as to whether he can drive or not because of the swelling in his lower back, I would say that he could not go back to work.

Dr. Kurtz' deposition of April 13, 2004, pp. 29-30.

In spite of the foregoing, Dr. Kurtz checked a box "yes" in a letter dated June 4, 2002, from Surety's case management service indicating he agreed with the panel's opinion that Claimant could perform sedentary to light work. Claimant's Exhibit B admitted at 2004 hearing.

15. After his accident, a caseworker for Surety informed Claimant that he must return to a light-duty position doing inventory and cleaning parts or he would lose his benefits. Claimant testified that he worked for four or five days but could not continue due to his having to take pain medication and was afraid he would get in an accident while driving the mountain road between the mine and his trailer in Clayton. Employer's Human Resources Safety Manager, Linda Wanstrath, confirmed that it was a caseworker who determined that Claimant could return to light-duty work. However, Wanstrath testified that Claimant only worked one day before he obtained a release from Dr. Kurtz taking him completely off work. She also testified that she observed Claimant working and that he did not appear to be having any difficulty. The light-duty job provided to Claimant was not intended to become a permanent position.

16. The only other employment Claimant attempted was flagging on highway jobs in 2001. He testified that he made about $4,000 dollars but because he was taking up to 100 pain pills on a four-day job he was afraid of injuring himself so he quit.

17. There is scant evidence regarding Claimant's employability in his labor market. No vocational consultants were involved in this case. The Referee is not acquainted with the labor market surrounding Claimant's current residence in Radersburg, Montana, and there is nothing in the record regarding the same. Claimant testified he could work in Bozeman or Helena but knows of no work that he could do. He is presently receiving Social Security disability benefits. He has not registered for the job service and has not requested vocational assistance in any job search. Dr. Kurtz opinion that Claimant is unemployable is not persuasive. Claimant's work attempts are also not persuasive as he voluntarily quit his flagging job based on his own opinions regarding safety issues; no physician opined he could not perform that type of work. He has not attempted to locate work since his flagging job in 2001. On the present record,

the Referee is not convinced that any further effort by Claimant to locate employment would be futile as there is no evidence of the availability of sedentary or light jobs in his labor market. The Referee finds that Claimant has failed to establish a *prima facie* case of odd-lot status. *See*, Seufert v. Larson, 137 Idaho 589, 51 P.3d 403 (2002).

18. Even though Claimant has failed to establish odd-lot status, that finding does not end the enquiry regarding whether he has incurred some PPD less than total. Claimant has lost access to medium and heavy labor jobs that he had access to prior to his accident and injury in 2000. He cannot return to his time-of-injury job as a millwright. He earned a decent living as a miner and millwright ($14-$20 an hour) and will no doubt suffer a wage loss if he re-enters the labor market. No vocational expert has quantified the loss of access or wages. However, based on the Referee's experience in other cases, Claimant's prior work history, his demeanor and physical appearance at hearing, his seeming lack of motivation to return to any type of work, his education, his transferable skills in operating equipment and problem-solving, his age, and his economic and personal circumstances, the Referee finds that Claimant has incurred PPD of 20% of the whole person inclusive of his 10% PPI. The Referee further finds that apportionment pursuant to Idaho Code § 72-406 is not appropriate in this case as Claimant had returned to doing heavy work for a number of years after his 1983 back injury.

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New Findings from May 8, 2007, Hearing

Claimant

19. Claimant continues to reside in Radersburg, Montana, which has a population of approximately 150 in the summer and 50 in the winter. He resided in Cascade, Montana, at the time of his industrial injury of May 2000. Cascade has a population of approximately 2,000 people and is 30 miles away from Great Falls, Montana. People in Cascade frequently commute to Great Falls for work. Claimant moved to the more remote town of Radersburg because it was

where he could afford to live. When Claimant was performing work for Employer, he stayed in a temporary residence in Clayton, Idaho.

20. Claimant describes his physical being as "about the same as it was" at the time of the 2004 hearing. However, Claimant's mental attitude has been impacted by depression and he has undergone the implantation of an electrical stimulator to help with pain reduction. May 8, 2007 hearing transcript, p 12.

21. Claimant's depression worsened to the point that he was considering suicide and he sought treatment with a psychologist in Bozeman, Jim Deming, Ed.D. Dr. Deming referred Claimant to Roy Tyler Frizzell, M.D., who treats disorders of the spine. Dr. Frizzell implanted a spinal cord stimulator for Claimant in December 2005.

22. Claimant testified that the stimulator has helped his conditions in some respects but that its use comes with complications. If Claimant uses his stimulator for a full 24-hour period, it "gets hot and irritates muscles." May 8, 2007 hearing transcript, p. 15. Claimant explained that he is unable to use his stimulator around certain types of machinery, in certain types of weather, or when he drives because the device is susceptible to surges of electricity. Household appliances and his television do not interfere with use of the stimulator. The benefit of using the stimulator is that it relieves Claimant's pain to the extent that he is able to reduce the amount of medication he takes. Overall, Claimant feels he is better off with the stimulator than he was without it.

23. Claimant has attempted employment since the previous hearing in 2004, but has not been successful in keeping a job. Claimant drove a potato truck for approximately three weeks in September 2006, but could not tolerate his pain level. He could not use his stimulator while driving machinery and felt that it was unsafe to operate the machinery while taking pain

medication. He attempted work for a livestock auction, sorting cattle through gates and into various pens. He experienced significant pain after standing on concrete all day, and would need pain medication which was problematic because of his 42-mile commute. He lasted four days at the livestock auction. Claimant sorted potatoes for about four weeks but had similar problems with pain and his commute. Claimant turned down a lucrative mining position in Alaska because it exceeded his physical restrictions. He is not registered with Job Service or any type of employment agency.

24. Claimant receives social security disability benefits of approximately $1,100 per month.

25. Claimant continues to treat with Dr. Kurtz on an occasional basis and drives approximately 50 miles each way to do so.

26. Defendants have continued to pay for medical treatment, other than the Colchicine injections which were cut off. Claimant has Medicare which covers 80% of the cost of each injection.

27. At the time of the May 2007 hearing, Claimant was taking approximately 125 to 150 Hydrocodone per month as well as 45 Oxycodone. He took at least twice as much medication prior to implantation of his nerve stimulator.

Dr. Kurtz

28. Dr. Kurtz has continued to serve as Claimant's treating physician. He testified that Claimant suffers from chronic pain which will require on-going prescription medication. Claimant takes Ultram, Norco, Lyrica, Effexor and Oxycodone. The medications prevent Claimant from working around heavy machinery or traveling by car more than 75 miles at a time.

29. Dr. Kurtz believes that Claimant should not return to any type of employment because Claimant's personality is such that he gives full effort and would take it upon himself to over-exert. Dr. Kurtz clarified his chart note of April 4, 2007 in which he indicated that "[Claimant] will never return to full time work and maybe [sic] able to do some partime [sic] limited work. Heavy lifting greater than 20 pounds is out." Claimant's Exhibit 1 admitted at the 2007 hearing. Dr. Kurtz testified that he meant that Claimant could perform light work around the house as opposed to returning to a light-duty employment situation. He feels that Claimant needs to be able to self-regulate limitations and not risk an employer requesting that he exceed his limitations.

30. The changes that have occurred in Claimant's condition since 2004 are the development of depression and the implantation of the stimulator. Use of the stimulator has allowed Claimant to reduce medications by 50% and reduce his follow-up visits with Dr. Kurtz from every two weeks to once a month. The depression requires medical management and is subject to recurrent episodes.

31. With regard to Claimant's condition, Dr. Kurtz testified that:

> …[W]e have stabilized his pain. There's been no change in his ability to do more things or less things or anything else. It's just been status quo. And I don't foresee any change that would allow him to go back to a normal working type of situation.

Dr. Kurtz' Deposition of July 2007, p. 18.

Dr. Deming

32. Dr. Deming is a psychologist who first treated Claimant for his depression in July 2005. He previously provided marriage counseling to Claimant. Dr. Deming diagnosed major depressive disorder with suicidal ideation related to chronic pain and attributable to the May 2000 industrial injury. Claimant's chronic pain results in a diminished capacity to sleep and

results in loss of energy. As a psychologist, Dr. Deming is not licensed to prescribe medication and he defers to Dr. Kurtz on issues relating to medication.

33. Therapeutic interventions, including placement of the stimulator, reduced Claimant's pain to the extent that he was not immediately suicidal. However, Dr. Deming believes that Claimant will continue to struggle with depression as long as he experiences chronic pain.

34. Dr. Deming's treatment focus is to return Claimant to some level of work. He feels that:

> [Claimant] can maintain some level of work-related activity for three or four, even five hours at a time. But as is consistent with individuals with pain problems, his recovery time for that exertion is oftentimes three, four, five days, and [with] an increase in the use of medicine as well as an increase in the use of his neurostimulator treatment.

Dr. Deming's deposition p. 9.

Dr. Frizzell

35. Dr. Frizzell is board-certified in neurosurgery and he primarily treats disorders of the cervical and lumbar spine. He implants approximately 50 spinal stimulators per year. Spinal cord stimulators diminish pain signals coming from an injured nerve by use of electrical currents. Adjustments are usually performed within the first six months of implantation and the batteries need to be replaced every seven years. Dr. Frizzell first treated Claimant on November 10, 2005, to address complaints of right-sided radiculopathy. He felt that Claimant was an appropriate candidate for a stimulator and Claimant underwent implantation on December 14, 2005.

36. As of May 2006, Claimant reported 65% reduction of spinal complaints which is a better than average outcome. Dr. Frizzell reports that Claimant has had "a very consistent and

prolonged satisfactory course" which is anticipated to stay the same. Dr. Frizzell's Deposition, p. 15.

37. As of April 2007, Dr. Frizzell placed Claimant in a light/medium work category. He assigned work limitations of 10 pounds maximum lift, pull, and push on an occasional basis with the ability to lift up to 25 pounds on an occasional basis. Claimant should avoid stooping and crawling which could interfere with the stimulator leads.

38. Machinery that emits significant magnetic currents may change the function of Claimant's stimulator by turning it off or making it more intense. Machinery that is the type found in a large power plant would cause interference with the stimulator, but machinery in an agricultural setting such as a potato plant would not. Claimant's description of electrical spikes are reflective of concerns Dr. Frizzell has heard from other patients. Certain machinery such as a magnetic imaging machine might cause hyperactivity of the stimulator, but contact with a microwave oven would not since microwaves generally operate on a different frequency.

39. Use of the stimulator impacts Claimant's level of pain, but does not alter Claimant's anatomy or physical condition. The stimulator allows Claimant to work with more force because it increases Claimant's ability to endure pain.

Mr. Crum

40. Douglas Crum, CDMS, is a vocational rehabilitation expert hired by Claimant to asses his employability in the Radersburg labor market. Mr. Crum reviewed medical records, the March 2003 determination of the Social Security Administration finding Claimant disabled as of May 7, 2000, and the Industrial Commission's 2004 decision in this case. He conducted a phone interview with Claimant in May 2007.

41. Mr. Crum opined that, based on the medical restrictions of Dr. Frizzell and the panel, Claimant has lost access to 100% of the medium-to-heavy labor jobs he was able to perform prior to his 2000 injury. Claimant's current vocational options are limited by his age, physical capacity, lack of skills, basic education and questionable literacy skills.

42. Mr. Crum concluded that Claimant is totally and permanently disabled and that the workers' compensation system has failed Claimant, at least in terms of disability assessment. Claimant has no reasonable ability to access jobs in his labor market and attempts at employment would be futile. Mr. Crum indicated that it was possible, but unlikely, that Claimant could find light work in food preparation or at a gas station in Townsend, Montana, which is twelve miles away from Radersburg and has a population of approximately 150.

43. Mr. Crum testified that Claimant's restrictions in 2007 were essentially the same as they were in 2004. Claimant's condition is somewhat improved based on the reduction in the amount of narcotic pain medication taken, but is otherwise the same.

DISCUSSION AND FURTHER FINDINGS

***Res Judicata* and Idaho Code § 72-719**

44. Defendants accurately summarized the legal doctrine of *res judicata* in their post-hearing brief. The legal doctrines of *res judicata* and collateral estoppel apply to agency proceedings, including those of the Industrial Commission. Welch v. Del Monte Corp., 128 Idaho 513, 516, 915 P.2d 1371, 1374 (1996). *Res judicata* is comprised of claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel). Hindmarsh v. Mock, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). Under the principles of claim preclusion, a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim. Id. The doctrine of claim preclusion bars

not only a subsequent relitigation of a claim previously asserted, but also serves as an absolute bar to claims relating to the same cause of action which might have been made. Id. Stated differently, *res judicata* bars relitigation of matters already raised, and those that could or should have been raised from the outset. U.S. Bank National Ass'n v. Kuenzli, 134 Idaho 222, 999 P.2d 877 (2000). The doctrine of *res judicata* extinguishes all claims arising out of the same transaction, or series of transactions from which the cause of action arose. Id at 881.

45. Regarding the separate, but related, concept of collateral estoppel, issue preclusion bars the relitigation of issues actually adjudicated in prior litigation between the very same parties. Rodriguez v. Department of Correction, 136 Idaho 90, 29 P.3d 401 (2001). Five factors must be evident in order for collateral estoppel to bar the relitigation of an issue determined in a prior proceeding: (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation. Id.

46. However, Idaho Code § 72-719 provides the Industrial Commission with authority to re-open an otherwise final award in limited situations. Fowler v. City of Rexburg, 116 Idaho 1, 773 P.2d 269 (1988). Idaho Code § 72-719 states:

> MODIFICATION OF AWARDS AND AGREEMENTS -- GROUNDS -- TIME WITHIN WHICH MADE. (1) On application made by a party in interest filed with the commission at any time within five (5) years of the date of the accident causing the injury or date of first manifestation of an occupational disease, on the ground of a change in conditions, the commission may, but not oftener than once in six (6) months, review any order, agreement or award upon any of the following grounds:
>
> (a) Change in the nature or extent of the employee's injury or disablement; or

(b) Fraud.

(2) The commission on such review may make an award ending, diminishing or increasing the compensation previously agreed upon or awarded, subject to the maximum and minimum provided in this law, and shall make its findings of fact, rulings of law and order or award, file the same in the office of the commission, and immediately send a copy thereof to the parties.

(3) The commission, on its own motion at any time within five (5) years of the date of the accident causing the injury or date of first manifestation of an occupational disease, may review a case in order to correct a manifest injustice.

(4) This section shall not apply to a commutation of payments under section 72-404.

47. There is no allegation or evidence of fraud in the present case. Accordingly, Claimant seeks to relitigate issues regarding medical benefits, permanent impairment, and permanent disability based on either a change in the nature or extent of his injury or disablement and/or to establish that modification of the Commission's award is necessary in order to correct a manifest injustice.

Change in Nature of Injury or Disablement

48. Since it is Claimant who seeks a modification of the Commission's previous decision, he bears the burden of showing a change in condition. Matthews v. Department of Corrections, 121 Idaho 680, 681 (1992).

49. Claimant testified that his physical condition has not changed. Claimant's onset of depression is related to his 2000 injury and treatment was properly provided by Defendants for this condition. However, there is no evidence that Claimant's physical limitations were impacted by his depression and/or that Claimant's depression impacted his disablement. Claimant's depression is subject to recurrence, but is treatable with medication and counseling.

50. Dr. Kurtz' opinions regarding Claimant's ability to return to work in 2007 are similar to the opinions he rendered in 2004. Dr. Kurtz has consistently indicated that Claimant has chronic pain and that he is unable to work beyond a self-controlled environment. Dr. Kurtz

considered Claimant's medication, the impact of weather and Claimant's inability to drive long distances when rendering his opinions in both 2004 and 2007.

51. Work restrictions imposed by Dr. Frizzell in 2007 are nearly identical to the restrictions imposed by the panel that were adopted by the Commission in its 2004 decision. Claimant is able to perform light work without prolonged stooping or bending. Dr. Frizzell's 2007 restrictions are slightly more liberal than those assigned in 2004. Dr. Frizzell testified that Claimant's physical condition was unchanged, but that he could tolerate more because of reduced pain secondary to the implantation of the stimulator.

52. Mr. Crum testified that Claimant's restrictions in 2007 were essentially the same as in 2004. Neither Dr. Frizzell nor Mr. Crum identified a significant change in disablement due to potential interference from magnetic currents with Claimant's stimulator.

53. Although various aspects of Claimant's situation have changed, he has failed to meet his burden of proof to establish that the nature or extent of his injury or disablement have changed since the 2004 hearing, such that he is entitled to relitigate his case pursuant to Idaho Code § 72-719. Claimant's depression was appropriately addressed. The implantation of a spinal stimulator relieved some of Claimant's pain and allowed him to reduce the amount of medication he takes. Neither situation impacted Claimant's physical restrictions or disablement.

Manifest Injustice

54. Defendants suggest in their post-hearing brief that the issue of modification of an award due to manifest injustice is not properly before the Industrial Commission since the statutory language of Idaho Code § 72-719(3) limits such review to situations when the Commission is acting on "its own motion" as opposed to a Complaint filed by a party. This assertion was recently addressed and rejected by the Idaho Supreme Court. The Commission

may review any order to correct a manifest injustice, even when a purported manifest injustice is brought to the Commission's attention by either party or a third party. Page v. McCain Foods, Inc., 145 Idaho 302, 179 P.3d 265 (2008).

55. The term "manifest injustice" should be construed broadly for purposes of determining whether an order of the Commission should be reopened. Goodson v. L.W. Hult Produce Co., 97 Idaho 264, 266, 543 P.2d 167, 169 (1975). "Manifest" has been defined to mean: capable of being easily understood or recognized at once by the mind; not obscure; obvious. "Injustice" has been defined to mean: absence of justice; violation of right or of the rights of another; iniquity, unfairness; an unjust act or deed; wrong. Webster's, Third New International Dictionary, 1967, as quoted in Sines v. Appel, 103 Idaho 9, 644 P.2d 331 (1982).

56. In the present case, Claimant disagreed with the initial decision of the Commission and exhausted his appellate remedies. Claimant now seeks to reopen the case with the addition of evidence that the Commission specifically noted was absent from the record in the 2004 hearing. The initial findings of the referee noted that there was "scant evidence" regarding Claimant's employability and commented that Claimant made a single attempt to return to work for an alternate employer following his injury. See preceding paragraphs 16 and 17.

57. Defendants continue to pay medical benefits for Claimant's 2000 injury, except for Colchicine injections and Prolo therapy which were addressed in the 2004 decision. Claimant has opted to continue with the injections through Medicare. Defendants heeded the clarification of the Idaho Supreme Court in V.J. Magee v. Thompson Creek Mining Co., 142 Idaho 761, 133 P.3d 1226 (2006) and have paid for other recommended treatment and prescription medication.

58. Claimant has received permanent impairment benefits consistent with a 10% PPI rating. There is no evidence that the assignment of a 10% PPI rating resulted in manifest injustice.

59. Claimant received permanent disability benefits consistent with a 20% PPD rating, inclusive of his PPI. Claimant was receiving Social Security disability benefits at the time of both the 2004 and 2007 hearings. Claimant argued at the 2004 hearing that he was totally and permanently disabled, but the Commission ruled that he had not met his burden to prove total permanent disability. Although Claimant continues to disagree with this determination, the ruling did not result in manifest injustice.

60. Claimant is collaterally estopped from relitigation of the issues litigated in 2004. Claimant had a full and fair opportunity to litigate issues of medical benefits, permanent impairment and permanent disability at his 2004 hearing and during the appeals process to the Idaho Supreme Court. Claimant now seeks to relitigate those same issues. The Industrial Commission's 2004 decision was affirmed by the Idaho Supreme Court and has become final.

61. Since Claimant has failed to establish either a change in condition or manifest injustice pursuant to Idaho Code 72-719, it is improper to allow Claimant to relitigate the same issues with enhanced evidence.

62. Even if the new vocational evidence offered by Claimant from Mr. Crum is considered, Claimant has failed to establish that he is permanently and totally disabled based on the limited opportunities in Radersburg, Montana. The Idaho Supreme Court has previously determined that a claimant should not be permitted to achieve permanent disability by changing his place of residence following an injury and that consideration of the labor market where the claimant resided at the time of injury may also be properly considered. Lyons v. Industrial

Special Indemnity Fund, 98 Idaho 403, 565 P.2d 1360 (1977). Claimant testified at hearing that he lived in Cascade, Montana, at the time of injury. The population of Cascade is approximately 2,100, compared to Radersburg which has an estimated population of 150. Further, Cascade is only 30 miles from Great Falls which presumably has a larger labor market than either Cascade or Radersburg. Mr. Crum did not consider this labor market.

63. Claimant has not established an unreasonable denial of benefits and is not entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

CONCLUSIONS OF LAW

1. Claimant has failed to establish a change in condition pursuant to Idaho Code § 72-719(1)(a).

2. Application of the Industrial Commission's initial decision in this matter did not result in a manifest injustice that requires correction pursuant to Idaho Code § 72-719(3).

3. Issues regarding benefits were previously litigated and are barred by the doctrine of *res judicata*.

4. Claimant is not entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this __9th__ day of October, 2008.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

ATTEST:

__/s/_____
Assistant Commission Secretary

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

V. J. MAGEE, Claimant, v. THOMPSON CREEK MINING COMPANY, Employer, and ACE FIRE UNDERWRITERS INSURANCE COMPANY, Surety, Defendants.	**IC 2000-020426** **ORDER** Filed October 21, 2008

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has failed to establish a change in condition pursuant to Idaho Code § 72-719(1)(a).

2. Application of the Industrial Commission's initial decision in this matter did not result in a manifest injustice that requires correction pursuant to Idaho Code § 72-719(3).

3. Issues regarding benefits were previously litigated and are barred by the doctrine of *res judicata*.

4. Claimant is not entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

5. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this __21st___ day of ___October____, 2008.

INDUSTRIAL COMMISSION

__/s/_____
James F. Kile, Chairman

__/s/_____
R.D. Maynard, Commissioner

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __21st___ day of ____October_____ 2008, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

EMIL F PIKE JR
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ge

Gina Espinosa